SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 101

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JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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R. K. WISE,
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*Counsel for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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May It Please the Court:

The petition of Annie Halliday respectfully shows to the Court:

### A. Summary Statement of the Matter Involved.

The petitioner, plaintiff-appellee below, recovered judgment against the respondent in the District Court of the United States for the Western District of South Carolina, on the verdict of a jury (R. 45), for total permanent disability benefits under a contract of yearly renewable war risk term insurance, judgment being entered by the District

Court for the sum of $57.50 per month in petitioner's favor beginning April 2, 1919.

At the conclusion of the evidence, respondent-appellant moved for a directed verdict.

Respondent-appellant appealed, presenting the question of whether there was substantial evidence that the insured became totally and permanently disabled, and whether the trial court erred in excluding evidence and in charging the jury.

The United States Circuit Court of Appeals for the Fourth Circuit, in the decision now sought to be reviewed (R. —), which is reported in 116 F. (2d) at page 812, held that there was no substantial evidence to prove that the insured was totally and permanently disabled. Having so decided, the Court of Appeals reversed and remanded the cause, not for a new trial, but with direction to enter judgment in favor of the United States, respondent-appellant, though no motion for a judgment despite the verdict had been made nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by a motion for a directed verdict.

Petitioner recognizes that in some cases evidence to take the issue of total permanent disability to the jury may fall short of that which requires the jury to consider the issue, but the settled rule is that on such motion the evidence should be viewed in the light most favorable to plaintiff. The Circuit Court of Appeals did not mention this rule in its decision, but violated it and invaded the province of jury. Petitioner further concedes that an overruled point that a verdict should have been directed may be saved and renewed by a motion for judgment. But this was not done here. The result,—the order for the entry of judgment contrary to the verdict,—deprives petitioner of his right of trial by jury, contrary to the Seventh Amendment.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version different from that which it may be fairly assumed the jury believed. The facts are hereafter set forth in the petitioner's brief in support of this petition.

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

> "Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any

kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The facts which the court below found could have been found by the jury on the testimony. It certainly can not be said, however, that the facts which the court found were those most favorable to the plaintiff which could be founded upon the testimony. It certainly has been the long settled law that the verdict of a jury is not to be directed or upset, unless the latter is true.

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted (R. 57).

The court below recognizes in its opinion that it was entering judgment notwithstanding the fact that its action was contrary to the expressed provision of Rule 50 (b). It stated (R. 57):

> "• • • We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of Baltimore & Carolina Line *v.* Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50 (b)) in the lower court a motion, after the verdict, 'to have judgment entered in accordance with his motion for a directed verdict.'"

The learned court cites in support of its position certain decisions which however are not controlling as will be more fully discussed in the brief filed in support hereof. In one of the decisions cited by the court below, the case of *Conway* v. *O'Brien*, Second Circuit, 111 F. (2d) 611, this Court granted certiorari to examine whether there had been sufficient compliance with Rule 50 (b) to authorize dismissal of the complaint, but this Court's view of the merits of that case made it unnecessary to discuss this question. That case involved the same question here presented and for the reasons which prompted this Court to grant certiorari in that case it is urged that this Court grant this petition.

In the case of *Berry* v. *United States*, No. 366, October Term, 1940, 85 L. Ed. (Advance Sheets, page 576) this Court in its opinion of March 3, 1941, stated that the Circuit Courts of Appeal were not in complete agreement upon the question here presented, yet this Court in the *Berry* case held that there was no occasion to decide the question here presented because this Court held that in that case the Circuit Court of Appeals erred as there was evidence from which a jury could reach the conclusion that the insured was totally and permanently disabled.

The action taken by the United States Circuit Court of Appeals in the instant case is contrary to the action taken by the United States Circuit Court of Appeals in the Fifth Circuit Court in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140; and is probably in conflict with the decision of this Court in the case of *Berry* v. *United States* decided March 3, 1941, where this Court stated:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the

> jury's without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In this Court's opinion in the *Berry* case it mentioned the decision of the court below in the instant case in its footnote No. 3 when it made the statement that the Circuit Courts of Appeal are not in agreement upon this important question of law.

It is believed that the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140, correctly states the applicable law and should be followed by this Court.

### B. The Basis of the Court's Jurisdiction.

It is competent for this Court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

### C. The Questions Presented.

Two separate and wholly independent and important questions of Federal Law are presented here which involve the very foundation of our judicial system. If the decision of the Circuit Court of Appeals stands the safeguard of jury trial guaranteed by our constitution is nullified. They are:

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh

Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner-appellee totally and permanently disabled, testimony which the jury may have believed, thus usurping the functions of the jury by invading their province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to find a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

**D. The Reasons Relied On for the Allowance of the Writ.**

1. It is important, in order that trial by jury may be preserved as intended by the Seventh Amendment, that this Court shall determine whether a Circuit Court of Appeals

may determine that a verdict should have been directed, by finding facts which are less favorable to petitioner than those which might have been found by the jury on the evidence.

2. The decision sought to be reviewed determined a novel and important question arising under Rule 50 (b) of the new Federal rules in a way in conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140; and in a way probably in conflict with the decisions of this Court in the cases of *Slocum* v. *New York Life Insurance Co.*, 288 U. S. 364, and with the recent decision of this Court in the case of *Berry* v. *United States*, decided March 3, 1941, 85 L. Ed. (Advance Sheets, page 576) No. 366, October Term and with the decision of this Court in the case of *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 395, which dealt with the State practice after which this rule was modelled.

Other Circuit Courts of Appeal which have reviewed motions for judgment contrary to verdicts made in District Courts pursuant to Rule 50 (b) have implied that they considered the making of such motions in the District Courts after verdict as required by the rule as indispensable to affirmance or reversal of the action of the District Courts on such motions. *Leader et al.* v. *Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3) and *Mass. Protective Association* v. *Mouber*, 110 F. (2d) 203 (C. C. A. 8); *Ferro Concrete Construction Company* v. *United States*, 112 F. (2d) 488 (C. C. A. 1); *Lowden et al.* v. *Denton*, 110 F. (2d) 274 (C. C. A. 8); *Reliance Life Ins. Co.* v. *Burgess et al.*, 112 F. (2d) 234 (C. C. A. 8).

Rule 50 (b) provides an instrumentality by which, without

loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be reexamined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660) "came to be supported on the theory that it gave better opportunity for considered rulings." It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better opportunity" to make the ruling in advance of the appeal. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad. In any event, the decision of this Court in *Aetna Insurance Co.* v. *Kennedy, supra*, indicated that a failure to make an appropriate motion in the trial court would be an insuperable bar to the entry by the Appellate Court of judgment other than for new trial.

If it is not necessary to give one's opponent a day in court on motions *non obstante veredicto* in the District Court, before invoking final action by the Circuit Court of Appeals as though such motions had been made in the District Court, as was held by the court below, this constitutes such a departure from the principles heretofore settled by this Court

in respect of the prior similar practice, as would be sufficiently important for this Court to settle the matter.

WHEREFORE, petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this cause in order that it may be reviewed and determined by this Honorable Court.

JAMES H. HALLIDAY,
*A Person Non Compos Mentis,*
By His Committee, ANNIE HALLIDAY,
*Petitioner,*
By R. K. WISE,
*Columbia, S. C.;*
WARREN E. MILLER,
*1343 H Street Northwest,*
*Washington, D. C.,*
*Counsel for Petitioner.*

# SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA.

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## BRIEF IN SUPPORT OF PETITION.

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### Reference to Report of Opinion Below.

This case in the District Court was not reported. In the Circuit Court of Appeals for the Fourth Circuit it is reported in 116 F. (2d) 812.

### Grounds of Jurisdiction.

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

### Statement of the Case.

Plaintiff claims permanent and total disability under his contract of war risk term insurance from April 2, 1919

(R. 3) which was denied by defendant's answer (R. 4). The jury returned a verdict on November 30, 1939 for the plaintiff and fixed the date of his permanent and total disability as April 2, 1919 (R. 45).

Judgment was entered in favor of plaintiff on April 18, 1940 (R. 45) and on appeal the United States contended that there was no substantial evidence that plaintiff was totally and permanently disabled and that the trial court committed reversible error in excluding evidence and in charging the jury. The United States Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the trial court and remanded the case with directions to enter judgment in favor of the United States (R. 57) notwithstanding the fact that no motion *non obstante veredicto* was made as required by Rule 50 (b) of the Federal Rules of Civil Procedure.

## Errors to be Urged.

1. The court below erred in finding there was no substantial evidence to prove that the insured was totally and permanently disabled as found by the jury by assuming the facts less favorable to plaintiff-petitioner than the jury could find from the evidence.

2. The court below erred, having found error in submission of the case to the jury, in directing the entry of judgment for defendant-respondent instead of remanding the case to the District Court for new trial.

## Summary of Argument.

I. The Circuit Court of Appeals Erred in Holding that the District Court Erred in not Directing a Verdict for Respondent.

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred

IN DIRECTING JUDGMENT NOTWITHSTANDING THE VERDICT INSTEAD OF DIRECTING A NEW TRIAL (NO MOTION OF THIS CHARACTER HAVING BEEN MADE).

III. THE OPINIONS OF THIS AND OTHER COURTS IMPLY THAT THE MOTION REQUIRED BY RULE 50 (B) FOR JUDGMENT NON OBSTANTE VEREDICTO IS ESSENTIAL TO CONFER AUTHORITY ON THE CIRCUIT COURT OF APPEALS TO AFFIRM OR REVERSE THE DISTRICT COURT WITHOUT REQUIRING A NEW TRIAL.

## ARGUMENT.

### I. The Circuit Court of Appeals erred in holding that the District Court erred in not directing a verdict for respondent.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled as found by the jury the question was for the jury. Here facts were in dispute which were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

It is significant that the court below at no place in its opinion reciting the facts upon which it found the evidence to be insubstantial referred to the fundamental rule that in determining a motion for a directed verdict the court must assume that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and all the inferences fairly deducible from the facts should be drawn in favor of the opposing party. See *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. R.* v. *Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 606; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663.

Abundant substantial evidence, medical and lay testimony and record evidence appears in this record. Plaintiff introduced one physician and seven lay witnesses. Defendant introduced one physician and but one lay witness. Gov-

ernment records showing plaintiff's nervous condition prior to his discharge from the Army and reports of medical examiners and hospital records after his discharge from the Army were introduced.

Doctor J. N. Land, who knew the insured practically all his life (R. 22) described his mental condition as psychoneurosis and said he was a hypochondriac. This witness testified (R. 22-23):

> "He is the talking type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. *I would not have advised him to do any work since he has been out of the army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically.*" (Italics supplied.)

This evidence is substantial and shows that the insured was unable to work without it being harmful to him. This Court in the *Lumbra* case, 290 U. S. 551 (at page 560) stated:

> "The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. *He may have worked when really unable and at the risk of endangering his health or life.*" (Italics supplied.)

This Court in the *Lumbra* case cited favorably the following cases:

*United States* v. *Phillips* (C. C. A. 8) 44 F. (2d) 689, 691;

*United States* v. *Godfrey* (C. C. A. 1) 47 F. (2d) 126;

*Carter* v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223;
*United States* v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651;
*Nicolay* v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173.

Here every element, which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

The court properly charged the jury (R. 39):

> "* * * Now, in considering what is permanent and total disability, the Government of the United States, operating this department of the Government providing for the World War veterans, has in its Regulation Number 11 defined what permanent and total disability means in the opinion of the Government, the defendant here. It defines total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially (R. 39) gainful occupation, without serious impairment to either body or mind. And it is to be deemed to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That means, to go just a little further—because that is perfectly clear, any impairment of mind or body from April 2nd, 1919; *whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him. 'If you do that, it is going to seriously impair your body or mind.' I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only*

*medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention.*" • • • (Italics supplied.)

The Circuit Court of Appeals, in commenting upon this testimony of Doctor Land stated that it had little probative force, basing its opinion, among things, that the doctor did not make a *physical* examination of the insured until about six years before trial. However, this suit is based upon a mental condition and even though the testimony might have but "little" probative force, yet whatever probative force it does have was for the jury to determine and not for the Circuit Court of Appeals.

Doctor Land also testified (R. 23):

"He is not physically in good shape, and is mentally in bad shape. *When he got out of the Army I didn't hold any hope for his recovery*, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

"The report of February, 1921 shows hypochondriasis, that is a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with this man he has dwelled (R. 23) on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike. • • •" (Italics supplied.)

(R. 25) "I thought he was a crazy man. • • • I know I tried to get him in (R. 26) the Columbia Hospital and they refused to take him. That was in 1937. • • •"

(R. 26) "My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would

recover. Has that been verified by the fact that he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir. * * *"

The insured's wife, who first met him in 1913, testified (R. 5):

* * * "We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia and stayed about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work in 1924.

(R. 5) With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. *That has continued to be true up to the present time.* He could not work all day. He worked maybe an hour or two. * * *" (Italics supplied.)

This testimony coming from a person who had an opportunity to continuously observe the insured shows that working actually was harmful to him. The court below did not draw proper inferences from this testimony. The weight to be accorded this testimony was for the jury to pass upon and undoubtedly it believed this witness and accorded her testimony and that of Dr. Land due weight.

The insured's wife further testified (R. 5):

"* * * With reference to his mental condition, he was suspicious * * * of everybody. That has been true since his discharge from service. He is suspicious of

his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, *he says he would rather die than go there.* He (R. 5) has been in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen. * * *"

* * * * * * *

"Q. Has this condition improved any since you were married?

A. None whatever.

Q. Is it any worse?

A. Well, he is harder to control now than he was at first. * * *"

The jury was justified in believing from the foregoing testimony that the insured's condition had not improved from April 16, 1921 when he was married until the date of the trial; and if his condition did not change in this period of time it was justified in concluding that it was reasonably certain that it would continue throughout the remainder of his life.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267 U. S. 608):

"As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

This was a proper inference to be deduced from the foregoing testimony but the Court of Appeals did not take this view of the evidence, favorable to the insured.

The Court of Appeals apparently penalizes the insured because his wife did not send him to a mental hospital. This is not only failing to give the evidence here all the proper inferences as required by decision of this court in *Gunning* v. *Cooley*, 281 U. S. 90 but penalizes this mentally incompetent insured because of something his wife did not do which apparently the Circuit Court of Appeals felt she should have done.

It is common knowledge that many persons abhor being patients in hospitals. Particularly is this true of a person suffering from mental ailments as was this insured; and particularly did he loathe the hospital at Augusta, Georgia. Persons with mental impairments are not held to the strictest rule of human conduct under the law but notwithstanding this, the court below held this crazy man to the same degree of care that it would impute to a sane man.

The court below apparently takes the position that it was incumbent upon the insured to secure adequate hospitalization, notwithstanding evidence of record here from Doctor Land that he tried to get him in the government hospital in Columbia but the government would not take him (R. 26). In this connection Doctor Land testified (R. 25):

> * * * "I thought he was a crazy man (R. 25). * * * I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia and they discharged him from the hospital in Roanoke as mentally competent, yet they wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was mentally competent when he was discharged from Roanoke, they wouldn't take in Columbia for intestinal

> trouble and wanted to send him to Augusta. I asked that question and they never answered it. * * *" (R. 25) Hospitals have not always been available.

The Circuit Court of Appeals gave to the facts in this case a much less favorable view than the evidence warranted on the question of hospitalization. It apparently overlooked entirely the above quoted testimony of Doctor Land in this regard, the apathy of the insured to hospitals, the fact that one suffering from a mental condition would rather be around their loved ones than behind the bars of a government insane asylum, and the fact that his own physician could not get the government to hospitalize him; and in addition th Circuit Court of Appeals placed upon this mentally incompetent disabled World War Veteran the burden of knowing what was best for him and erroneously penalized him for the failure of his wife to send him to an insane asylum against his wishes although she thought it would be a good thing. The Circuit Court of Appeals, in placing this construction upon this testimony overlooked the human element which doubtless appealed to this jury, who doubtless gave weight to this testimony, based upon their experience in life. This petitioner was denied by the Circuit Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this court in *Gunning* v. *Cooley, supra.*

Particularly is it significant in the instant case that the United States produced no witness to contradict the testimony of Doctor Land or any one of petitioner's seven lay witnesses. Defendant's only medical witness, Doctor Young, testified that no (R. 33) mental examination was

made by him of the insured and admitted that it was not unusual to examine a person physically and overlook the (R. 33) "mental side" and that very often the patient can conceal the fact of mental abnormality from the physician who makes a physical examination.

The court below cites the case of *Mikell* v. *United States*, 64 F. (2d) 301, a case of chronic appendicitis, *United States* v. *Ennis*, 73 F. (2d) 310, a case of tuberculosis, *United States* v. *Marsh*, 107 F. (2d) 173, a case involving appendicitis and adhesions, *Neeley* v. *United States*, 115 F. (2d) 448, a case involving arrested tuberculosis as authority for the proposition that the conduct of this insured, who is insane, is governed by the same rules as the conduct of a sane person. None of the cases cited by the court below involve an insane man as authority for the proposition that this insane veteran should be charged with the failure of the government to adequately hospitalize him. This portion of the decision of the court below is contrary to the reasoning in the decision of the Fifth Circuit in the case of *Gilmore* v. *United States*, 93 F. (2d) 774 where that court at page 777 stated:

> * * * "but an inference drawn by a process of probable reasoning from the conduct of an ordinarily prudent person does not rationally follow from the same conduct of one who is insane * * *."

The court below although stating that it was unnecessary in view of the position they took that there was insufficient evidence to submit the case to the jury, proceeded to consider a ruling by the District Judge that no evidence would be admissible as to the insured's condition subsequent to December 9, 1935 the date on which the State Probate Court adjudged the insured to be of unsound mind and appointed his wife as committee for him.

In the case of *Cox* v. *United States*, 24 F. (2d) 944, which was a case involving the war risk insurance contract of a

mentally incompetent person, the Fifth Circuit Court of Appeals stated:

> "As an interdict he was incapable of entering into a legal contract of employment, and it is reasonably certain that he could not have secured employment from any but a friend who would put up with his idiosyncrasies. Ability to continuously follow a substantial, gainful occupation implies *ability to compete with men of sound mind and average attainments under the usual conditions of life.* Argument is not needed to demonstrate that one who has been officially declared insane and has exhibited the vagaries that Cox did could not successfully so compete, although he might have lucid intervals in which he could render satisfactory service. This conclusion finds support in the reasoning of the court in the following cases: Starnes *v.* U. S. (D. C.), 13 F. (2d) 212; Jagodnigg *v.* U. S. (D. C.), 295 Fed. 916; Forbes, Dir., *v.* Welch (App. D. C.), 286 Fed. 866." (Italics supplied.)

It was stated by the Court of Appeals for the District of Columbia in the case of *Forbes* v. *Welch* (No. 3883 in that court) 286 Fed. 765:

> "The decree of lunacy, however, is prima facie evidence of the actual insanity of the person thereby placed under guardianship, and establishes a status of that individual which is notice of the incapacity of the ward to all the world. Leggate *v.* Clark, 111 Mass. 308. It does not establish as against strangers or as between a party or as between a party, or privy, and a stranger the form of the insanity of the ward, its transmissible character, or any evidentiary fact upon which the ultimate adjudicated fact is grounded." Boston Safe Deposit and Trust Co. *v.* Bacon, 229 Mass. 585, 589.
>
> "The decree, however, has evidential bearing upon the question of total disability. It is a dominant fact too important to be totally ignored. *By virtue of the decree the ward is restrained from pursuing any gain-*

*ful occupation. His disability, regardless of the degree of insanity or mental or physical disqualification, is complete."*

Incidentally, counsel for appellee stated to the court (R. 10) that he had no objection to appellant asking questions as to the record of the insured's activities since the appointment of a committee by the Probate Court, and stated that the government records would show that the insured was insane after December 9, 1935. As a matter of fact, on December 18, 1935 the records show (but are not in evidence here because the court on objection (R. 22) by government counsel excluded them) that the insured was given a diagnosis of manic depressive psychosis, depressed type.

When considered in the light of all other evidence in this case, including the action of government counsel, appellant's lack of contention in its appeal in the court below that it had any proof to offer to rebut the continued insanity of the insured, and appellant's contention that the action of the trial court merely relieved plaintiff from establishing total permanent disability to the date of trial, it follows that it was not error for the court to exclude this evidence.

If there was error, it was not prejudicial, but harmless. Appellant has not shown here that it was at all prejudiced in the ruling of the trial court in the instant case. In order for reversible error to exist, this must be shown.

From the record now before the court there is a legal presumption of the continued insanity of the insured after his adjudication until the contrary is shown. The general rule seems to be that a person adjudged to be insane is presumed to so continue until it is shown that sanity has returned. But here we do not need to rely on this presumption because the facts conclusively establish insanity at time of trial. The complaint filed November 20, 1936 by the insured's committee (R. 2-3) and the testimony of the committee

shows conclusively that both at the time this suit was filed and at the time of the trial on November 30, 1939 (R. 4) the insured's wife was still his committee. So, it could not have been shown by the appellant that the insured had been restored by the county court to sanity.

Being insane and so adjudicated the insured was incapable of entering into a legal contract of employment with any one and is incapable of handling his own affairs. This fact could not have been disputed.

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> • • • "His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of co-ordination between his mind and his body, and as said by us in Asher *v.* United States (C.C.A. 8) 63 F. (2d) 20, 23:
>
> "True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. • • •"

In the case of *Jagodnigg* v. *United States*, 295 Fed. 916, a war risk insurance case in which the court held the insured to be permanently and totally disabled, after reciting the definition of total and permanent disability said:

> "This certainly does not mean that the requirements 'to follow continuously any substantially gainful occupation' shall be satisfied by the performance of some negligible duties under supervision and direction of a guardian or caretaker. What is meant is clearly the ability of the soldier to earn substantially through *independent effort*. This young man has physical strength, but he is less than a child in mind. He has been judicially held to be capable of handling his affairs. He is under guardianship, • • •"

This appellee has not been harmed by the ruling of the trial court as to evidence after 1935 because obviously it

could not prove that an insane man was able to follow continuously a substantially gainful occupation.

It was said by the trial court (R. 45) here:

> • • • "the jury returned a proper verdict in this case and I am convinced that if new trial were granted, another jury would come to the same conclusion. • • •"

**II. Assuming the District Court erred in submitting the case to the jury, the Circuit Court of Appeals erred in directing judgment notwithstanding the verdict instead of directing a new trial (no motion of this character having been made).**

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury but the point must by some appropriate means be submitted to the trial judge after verdict and be by the trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities, is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50 (b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the

issue of total and permanent disability, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court made.

New Federal Rule 50 (b) makes universally possible in federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Ins. Co.*, 228 U.S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a federal rule. He discusses the manner by which sufficiencies of evidence have been challenged in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a judgment *non obstante veredicto*, a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance remains the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and

a new trial, unless means are taken to bring the matter into the record for disposition by the judge after the trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate Court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

The Federal Rule 50 (b) is merely an instrumentality to accomplish the reform which had been local to the states, notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed

verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line* v. *Redman*, *supra*, 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's opportunity for consideration of the sufficiency of the evidence was as good and as unhurried before the ru' as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

This Court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 392, 394, 395. The point appears from the following from this Court's opinion:

> "The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."
>
> * * * "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should

have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying they found nothing in Rule 50 (b) to restrict its power to direct entry of judgment.

The court below found nothing in Rule 50 (b) that restricts their power to direct the entry of judgment by the lower court in favor of the defendant rather than to order the granting of a new trial. The court below further states that defendant was *permitted* under Rule 50 (b) to file a motion after verdict. The court's position in this regard is believed to be erroneous because as we view the rule the defendant was *required* to file a motion after verdict in order to justify the action taken by the Circuit Court of Appeals here.

The action of the court below is directly contrary to the holding of the decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, with which case this Court is familiar. This action in remanding the case with instructions to direct a verdict was grounded upon the following cases:

*Conway* v. *O'Brien* (2 Cir.), 111 F. (2d) 611, 613;
*Eastern Livestock Cooperative Marketing Ass'n, Inc.*, v. *Dickenson* (4 Cir.), 107 F. (2d) 116, 120;
*Lowden* v. *Denton* (8 Cir.), 110 F. (2d) 274, 278.

The decision of the Second Circuit in the case of *Conway* v. *O'Brien* is grounded upon the case of *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, and *Massachusetts Protective Association* v. *Mouber* (8 Cir.), 110 F. (2d) 203, in both of which cases motions for verdict *non obstante veredicto* were made. Therefore these decisions are no basis for the action taken by the Second Circuit in the *Conway* case.

The decision of the Circuit Court is based in part upon the *Conway* case. Therefore if the *Conway* case is grounded upon cases which do not support its decision, it follows necessarily that it must fall, and therefore that part of the instant decision of the court below using the *Conway* case as a basis must likewise fall.

In the case of *Eastern Livestock Corp.* v. *Dickenson*, 107 F. (2d) 116, cited by the court below a motion was made in the trial court to set aside the verdict.

In the case of *Lowden* v. *Denton*, 110 F. (2d) 274, relied upon by the court below a motion was made to set aside the verdict in that case after judgment in accordance with the motion for directed verdict at the close of the evidence. The record of the Circuit Court of Appeals became the record of the United States Supreme Court and such record was filed in this Court May 17, 1940. See pages 11-13 of that record.

In *Brunet* v. *S. S. Kresge Co.* (C. C. A. 7 decided Nov. 20, 1940), cited by the court below in support of his opinion a motion *non obstante veredicto* was made.

Also, in *Willis* v. *Pennsylvania Railroad Co.*, 35 Fed. Supp. 941, there was a subsequent motion after verdict.

In the case of *Montgomery Ward* v. *Duncan*, decided De-

cember 9, 1940, by this Court, the question here involved was not there presented, that case merely holding that motions for new trial were for the trial courts. This decision has nothing to do with the questions here involved.

In the case of *Demers* v. *Railway Express Agency*, 108 F. (2d) 107, a motion was filed after verdict.

**III. The opinions of this and other courts imply that the motion required by Rule 50 (b) for judgment non obstante veredicto is essential to confer authority on the Circuit Court of Appeals to affirm or reverse the District Court without requiring a new trial.**

The following cases imply a view contrary to that of the court below:

*Ferro Concrete Const. Co.* v. *United States*, 112 F. (2d) 488, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

In *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8), the court said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule" (50 b) "of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

In *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 240, C. C. A. 8, the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the

cause remanded with directions to enter judgment for the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Assn. *v.* Mouber, 8 Cir., 110 F. (2d) 203; Lowden *v.* Denton, 8 Cir., 110 F. (2d) 274."

In the case of *Pruitt* v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) 140, 143 (C. C. A. 5), Circuit Court Judge Sibley carefully considered Rule 50 (b).

**Conclusion.**

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed, in holding that the District Court erred in not directing a verdict for the respondent, and in directing a judgment notwithstanding the verdict instead of directing a new trial, are such as call for review and determination by this Honorable Court.

Respectfully submitted,

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